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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 551

PAUL GINSBURG, Petitioner,

v.

BONN KRAUS GINSBURG and JOHN PAUL GINSBURG, Minors, by their Guardian Ad Litem, BETTY K. GINSBURG, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND APPENDIX.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Paul Ginsburg, respectfully prays that a writ of certiorari issue in the above captioned case directed to the United States Court of Appeals for the Ninth Circuit to review its judgments (none of which was accompanied by an Opinion) in appeal No. 16,768, the one dated and entered April 11, 1960 (App. 5), denying your petitioner's Motion to Open Up and Vacate the District Court Orders Appealed From and to Retransfer and Remand the Cause to the Pennsylvania District for Trial; and the other dated and entered May 9, 1960 (App. 6), granting a Motion to Dismiss the Appeal.

OPINIONS BELOW

In the United States District Court for the District of Arizona at No. Civ.—2664 Phoenix, District Judge Dave W. Ling failed to deliver any Opinions and that Court's Judgment, entered June 19, 1959, is not reported

In the United States Court of Appeals for the Ninth Circuit in appeal no. 16,768 only one Opinion was entered, February 10, 1960, in support of that Court's denial of appellees' first Motion to Dismiss the Appeal (App. 1), which is not sought to be reviewed; and that Opinion is reported in 276 F. 2d 94. The judgments of that Court sought to be reviewed herein (App. 5 and 6) were not accompanied by Opinions and are not reported.

JURISDICTION

The judgments sought to be reviewed were dated and entered April 11, 1960 (App. 5) and dated and entered May 9, 1960 (App. 6). The timely Petition for Rehearing was denied on June 29, 1960. On September 19th, 1960, Mr. Justice Douglas entered an Order extending the time for filing this petition for writ of certiorari to and including November 26, 1960.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C., section 1254 (1); and the general supervisory power of this Court over lower Federal Courts.

QUESTIONS PRESENTED

1. Does not a District Court Order transferring a cause (over objection) pursuant to motion under 28 U.S.C., sec. 1404 (a), conflict with the law of the instant Circuit and other Circuits as well as with applicable

decisions of this Court, when it transfers an *in rem* interpleader proceeding wherein the interpleaded fund had been paid into the registry of the transferor Court and it transfers the cause to a district where the action could not have been brought; leaving the transferee Court no legal alternative but to retransfer and remand the cause to the transferor Court?

2. When it develops at the trial in the transferee Court that the Order of transfer was procured through fraud does it not become the duty of that Court to adjudicate the fraud and declare the Order of transfer void and all proceedings subsequent thereto a nullity, and *a fortiori* retransfer and remand the cause to the transferor Court on the theory that the transferor Court never lost jurisdiction and the transferee Court never acquired jurisdiction; and does not the transferee Court's failure and refusal to do so enter a conflict with the law of the Circuits and applicable decisions of this Court?

3. When the decedent-insured had made his brother the absolute owner, sole beneficiary, premium payer and possessor of policies of insurance on his life, can the decedent-insured's ex-wife establish an alleged oral trust for their two children "at the time" when said brother became the absolute owner, sole beneficiary, premium payer and possessor of the policies in writing on the forms supplied by the insurer for that purpose and at the office of the insured; and does not an adjudication awarding such a fund without a scintilla of evidence to support it, enter a conflict with the law of the Circuits as well as applicable decisions of this Court, and also deprive the owner of the policies of important

rights under the Constitution and laws of the United States?

4. In interpleader proceedings, even in legitimate cases, does not the successful litigant recover only the interpleaded fund; and does not a Court Judgment charging the unsuccessful litigant with fees and interest from the date of the interpleader enter a conflict with the law of the Circuits and applicable decisions of this Court?

5. When the record in the Court of Appeals fully supports appellant's Motion to Open Up and Vacate the District Court Orders Appealed From and to Retransfer and Remand the Cause to the Pennsylvania District for Trial, does not the Order denying said motion conflict with the law of the instant and other Circuits as well as with applicable decisions of this Court?

6. When a Motion to Dismiss a wholly meritorious appeal is based upon false representations that the appellant has not perfected his appeal pursuant to the Federal Rules of Civil Procedure, which misrepresentations are refuted by the record, does not an Order granting such motion to dismiss conflict with the law of the instant and other Circuits as well as applicable decisions of this Court?

STATEMENT OF THE CASE

On June 16, 1953, The Mutual Life Insurance Company of New York brought this interpleader proceeding in the United States District Court for the Western District of Pennsylvania at Civil Action No. 11,521, by the filing of a Complaint. Pursuant thereto the proceeds of two policies of insurance on the life of Samuel A. Gins-

burg, brother of petitioner, were paid into the registry of that Court. The said insured had died on April 7, 1953.

On November 26, 1952, the decedent-insured admittedly, formally and irrevocably made your petitioner the absolute owner, sole beneficiary, premium payer and possessor of two life insurance policies. On that day the decedent-insured accompanied by your petitioner took the policies to the Phoenix, Arizona, office of the insurer where said Samuel A. Ginsburg duly executed the insurance company's forms for that purpose and your petitioner paid the premiums then in the grace period. In due course the policies, together with the executed forms, were forwarded to the Home Office of The Mutual Life Insurance Company of New York to effectuate the endorsements, and thereupon the policies so endorsed were sent to your petitioner at his residence — Carlton House, Pittsburgh, Pennsylvania.

The face value of said policies was $30,000.00, but there were loans against the cash value. When the policies were assigned to your petitioner, they had a nominal value. The amount of the interpleaded fund was $27,456.38.

On or about April 17, 1953, the Pittsburgh Agent of The Mutual Life Insurance Company of New York issued a receipt to your petitioner for the policies, being surrendered for payment. Subsequently, when the payment was not forthcoming, your petitioner learned that the ex-wife of the decedent-insured and her Phoenix divorce Attorney (Samuel Langerman, Esquire) had been communicating with the insurer, framing a claim that the proceeds should be paid to petitioner only as Trustee for the two minors.

Failing in her effort to procure a compromise or nuisance share of the policy proceeds from the insurer, and for the sole purpose of advancing a scheme so to do, suit was filed on May 1, 1953, in the United States District Court for the District of Arizona at Civ. No. 1882 Phoenix. Named as defendants therein were the insurer and your petitioner; and the claim was that your petitioner be declared a Trustee of the proceeds for the two minor sons under an alleged oral trust created "at the time" when your petitioner was made the absolute owner, sole beneficiary, premium payer and possessor of the policies in writing. *During the course of the interpleader proceedings, Mr. Anderson, the Phoenix agent of the insurer, swore in Depositions that "at the time" of the transaction there was no mention of any trust and that, if there were, he would have given the decedent-insured different forms to sign; that the only persons present were the insured, your petitioner, and himself; further that he gave the routine explanation that henceforth the insured could not exercise any rights in the policies, but only his brother, Paul, could, to which the insured (an attorney) replied that he knew it and that is the way he wanted it to be; and finally that the insured appeared to know exactly what he was doing.*

After the said suit was filed in Phoenix, your petitioner on May 11, 1953, sued The Mutual Life Insurance Company of New York for the proceeds under his contracts, in the United States District Court for the Southern District of New York at Civil Action No. 8533. Then the insurer threatened to interplead the fund.

Your petitioner expressed his vehement opposition to an interpleader or to any other such litigation; and requested the insurer to present a Motion to Dismiss

the Phoenix Complaint, explaining that said Court lacked jurisdiction over his person and the Complaint on its face failed to state a claim upon which relief could be granted against the insurer, but it refused so to move. Even after your petitioner offered to pay all fees and expenses in connection therewith, the insurer refused so to move. Incidentally, your petitioner's Motion to Dismiss said Phoenix Complaint was granted on March 31, 1958, because the Court "has no jurisdiction over his person".

Finally, to avert the interpleader, your petitioner notified the insurer that it was not authorized by the Judicial Code and otherwise would be unlawful, as both claimants wanted the fund paid to Paul Ginsburg. Your petitioner wanted the fund paid to him individually; and his adversary wanted it paid to him as a trustee. All that the insurer had to do, therefore, in order to avoid dual liability, was to issue its check to the order of Paul Ginsburg, individually and or as trustee. It is elementary that the insurer had no right or duty to go any farther, as to see to the administration of the "trust", *et cetera*.

The insurer, nevertheless, unjustifiably threatened to interplead the fund in Phoenix, if your petitioner would not consent to the proceedings being had in Pittsburgh; for the interpleading plaintiff, insurer, was determined to proceed with its erroneous representation that there were two claims adverse to it.

After the fund was paid into the registry of the Western Pennsylvania District Court, Loyal H. Gregg, Esquire, was appointed guardian ad litem for the two minors; and his first move was purportedly under 28

U. S. C., sec. 1404(a), for transfer to the Arizona District, over petitioner's objections. The court's Order that the cause should be transferred for the convenience of witnesses was repeatedly the subject of prohibition, mandamus and appeal in the Court of Appeals for the Third Circuit, but said Court would not grant a writ of prohibition, or a writ of mandamus, or an appeal (dismissing the appeal on motion for want of an appealable Order). The dismissal of the appeal on motion became the subject of a denied petition for writ of certiorari to the court of appeals for the Third Circuit at No. 929 October Term, 1955, and the proceedings and appendices therein are incorporated herein by reference.

The transfer of the cause was finally put into effect by an Order dated May 9, 1957, entered by Chief District Judge Wallace S. Gourley of the Western Pennsylvania District.

It should be pointed out that in said Pennsylvania proceedings the mother of the two minors, Betty K. Ginsburg, was named as a defendant by the insurer, but before the cause proceeded on the framed issue, she always appeared as Betty K. Hilsdorf because she married one Thomas J. Hilsdorf in June, 1953. By the time the cause came on to be heard in Phoenix, she had been divorced from Hilsdorf but testified as Betty K. Hilsdorf, although she carried on the litigation as Betty K. Ginsburg, guardian ad litem for the minors.

The "trial" in the Arizona District Court was set for the week of November 17, 1958, before Judge Dave W. Ling, the only Federal Judge in Phoenix. Your petitioner sought one continuance, in support of which he submitted a list of cases then pending in higher Courts

which required prompt attention by him not only in Pittsburgh, but also in Philadelphia, New York and Washington, D. C. Judge Ling, nevertheless, denied the Motion for Continuance on November 3, 1958. Your petitioner promptly retained the Phoenix law firm of Beer, Seaman & Polley to represent him. Hess Seaman, Esquire, requested a continuance in order to prepare for trial, and Judge Ling denied that. On November 17, 1958, said counsel argued your petitioner's Motion for Summary Judgment, which was denied from the Bench. Your petitioner then had no alternative but air travel cross-country to arrive at Phoenix for the trial the day of November 18, 1958 and the morning of November 19, 1958.

Your petitioner had been put to all of this tremendous expense, inconvenience and harassment because the interpleaded plaintiffs, through their guardians ad litem and attorneys, had represented in affidavits as well as in open court at Pittsburgh that they had three witnesses at Phoenix who could and would testify, in support of their alleged oral trust. (The guardians ad litem had made it a matter of record that the two minors knew nothing of the matter and would not be called to testify.) In order to obtain sympathetic consideration of transfer for the convenience of witnesses, they also represented that the interpleaded plaintiffs could not afford the cost and travel time to Pittsburgh.

Your petitioner knew that the representations about their financial condition were false and fraudulent, because their interests in Trust Funds at Pittsburgh alone exceed a quarter of a million dollars, *which was not denied at the trial*. What made that fraud all the more reprehensible was the fact that the chief perpetrator

of the fraud was their cousin, Attorney Eugene B. Strassburger, who is also a co-Trustee of those very Trust Funds at Pittsburgh.

Your petitioner knew too that their representations in affidavits and in open court that they had those three such witnesses (or any other witnesses) were false and fraudulent, but he obviously could not expose that fraud until they had been given an opportunity to testify and failed. During the trial the three named witnesses were in Phoenix, but they called only two; *and, incredible as it may seem, both testified against the interpleaded plaintiffs' Complaint.* All that they testified to was that the decedent-insured had told them that if anything should happen to him, his two children were well provided for, but did not say how; *and further that he had not made any mention whatever of life insurance policies.*

All of the testimony offered by the interpleaded-plaintiffs, respondents herein, was hearsay, incompetent, irrelevant, immaterial or false; but even if it were admissible, competent, relevant, material and true, it could not possibly have established the alleged oral trust "at the time" or at any time. All that your petitioner, the interpleaded defendant, had to do in order to prevail was rely upon his written contracts of insurance and the above mentioned Deposition of Emil O. Anderson in a Court of justice.

On June 18, 1959, Judge Ling entered an Order denying petitioner's Motion to Retransfer the Cause. On June 19, 1959, Judge Ling signed the insupportable and untenable Findings of Fact and Conclusions of Law submitted for his signature by the respondents and entered

them. The same day Judge Ling signed and entered the Judgment in favor of the respondents which they submitted. On September 21, 1959, Judge Ling entered an Order denying petitioner's timely Motion for New Trial; for Reconsideration of Motion to Retransfer the Cause for Lack of Jurisdiction; and to Vacate and Set Aside Findings, Conclusion, Order and Judgment.

Prior to the entry of Judge Ling's final Judgment, your petitioner moved to have the order of transfer vacated for fraud, and petitioned for such relief at Miscellaneous No. 2354 before Chief District Judge Gourley of the Western Pennsylvania District who refused, and in the Court of Appeals for the Third Circuit wherein mandamus was denied. That matter became the subject of a denied petition for writ of certiorari herein to the Court of Appeals for the Third Circuit at No. 663 October Term, 1959, and the proceedings and appendices therein are incorporated herein by reference.

In due course your petitioner had filed his Notice of Appeal, Bond for Costs on Appeal, and Designation of Contents of Record on Appeal, designating "the complete record and all the proceedings and evidence", fully complying with F.R.C.P. Rule 75. Then your petitioner duly perfected his Appeal in the Court of Appeals for the Ninth Circuit.

Prior to the time for docketing the appeal, the respondents presented a preliminary Motion to Dismiss Appeal because of an alleged faulty Notice of Appeal. On one week's Notice, your petitioner again traveled cross-country to Los Angeles to argue in opposition to that preposterous motion, which was denied (App. 4). Your petitioner argued that the same counsel (Moore &

Romley of Phoenix) had within the past few years persuaded the same Court (Ninth Circuit) to grant a similar Motion to Dismiss, thus entering a conflict with other Circuits; but that this Honorable Court had granted certiorari and reversed the Judgment of the Ninth Circuit (*State Farm Mutual Automobile Ins. Co. v. Palmer*, 350 U.S. 944, 1956), resolving the conflict. Even the Ninth Circuit, under such circumstances, could hardly have granted that motion to dismiss. The accompanying Opinion (App. 1-4) of the Ninth Circuit pretended to adjudicate the issue as though it had not been squarely raised and decided in the *State Farm* case, *supra*, not even citing that case; when all that the Court had to do to support its denial of that motion to dismiss was state that it had already been decided in the *State Farm* case.

That four-page Opinion of the Court of Appeals, which was unnecessary, accentuates the suspicion surrounding that Court's failure to enter any more Opinions in support of its subsequent Orders, all of which were erroneously adverse to your petitioner, and which were required. It is provided by the Canons of Judicial Ethics that supporting judicial opinions should accompany Orders of Court in order to keep them above suspicion.

Two subsequent Orders of the Court of Appeals, unsupported and insupportable, and sought to be reviewed herein, are the Order (App. 5) denying the Motion to Open Up and Vacate the District Court Orders Appealed From and to Retransfer and Remand the Cause to the Pennsylvania District for Trial; and the Order (App. 6) granting the respondents' second Motion to Dismiss the Appeal. Petitioner's timely Petition for Rehearing was denied. Hence this petition.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I. The Order of Court Transferring This Cause From The Pennsylvania District To The Arizona District Was Erroneous.

A. The pronouncements of this Honorable Court in *Hoffman, U. S. District Judge, v. Blaski, et al.*, C. A. 7th Cir., 363 U.S. 335, decided June 13, 1960, make it plain beyond question that this cause should not have been transferred to the Arizona District where it could not have been brought, because of that Court's lack of venue and personal jurisdiction over your petitioner, interpleaded defendant therein; and not even if your petitioner had consented, and waived venue and personal jurisdiction defenses.

The Phoenix Complaint of Civil Action No. 1882 Phoenix, which instigated this action, was dismissed on petitioner's motion March 31, 1958, because the Court "has no jurisdiction over his person".

Mr. Justice Whittaker, in affirming the Seventh Circuit decision at 260 F.2d 317, stated in the Opinion of the Court (343), that this Court agrees with the dissenting opinion of the Third Circuit in *Paramount Pictures, Inc., v. Rodney,* 186 F. 2d 111. Thus it is evident that the Third Circuit's sanctioning of the instant transfer entered a conflict with the correct Circuits and the Law of the Land.

Mr. Justice Stewart, concurring, has thus indicated the instant petition should be granted, in stating (345), "In any event, the conflict between the Circuits is now resolved, and what happened here will not happen again".

B. The instant case is an *in rem* proceeding, not subject to transfer under 1404(a).

In Pennsylvania, interpleader, where the money has been deposited in the registry of the Court, is a proceeding *in rem*. *Metropolitan Life Ins. Co. v. Schultz*, 21 Pa. D. & C. 687. Furthermore, the federal interpleader statute provides (28 U.S.C., sec. 1335) that the interpleader fund is ". . . there to abide the judgment of the Court"; and that (28 U.S.C., sec. 2361) "Such District Court shall hear and determine the case . . .".

II. The Order Of Court Transferring The Cause Is Void Because It Was Procured Through Fraud.

It is a matter of record that the cause was transferred to Arizona for the "convenience" of three supposed witnesses at Phoenix by reason of false representations that they could and would testify in support of the averments of the interpleaded plaintiffs' Complaint; and that sympathetic consideration of the Motion for transfer was procured through false statements about the financial condition of the said respondents. Thus a fraud was perpetrated upon the Court and upon your petitioner. It is elementary that the Order of transfer procured through fraud is void and all proceedings subsequent thereto are a nullity. It necessarily follows that the Pennsylvania District Court never lost jurisdiction and the Arizona District Court never acquired jurisdiction of the cause.

III. The Arizona District Court Erred In Not Retransferring The Cause To The Pennsylvania District, Especially After Discovery Of The Fraud.

A. After the interpleader action had been transferred to Phoenix and before the trial, the Arizona District Court entered an Order dismissing the Phoenix Complaint (which brought about the interpleader) because the Court "has no jurisdiction over his person", which made it *res adjudicata* that the action could not have been brought in Arizona.

B. During the course of the trial, it became evident that the Order of transfer had been procured through fraud, thus being void and rendering all proceedings subsequent thereto a nullity.

C. The illegal transfer of the cause deprived your petitioner of his right to defend the claim in a court of competent jurisdiction in the District where he resides.

In view of these points, the Order of the Arizona District Court entered June 18, 1959, denying petitioner's Motion to Retransfer the Cause, was erroneous.

IV. The Alleged Oral Trust Was Unprovable And Unproved And Thus The Arizona District Court Judgment Was Erroneous.

At the trial nothing was offered even to attempt to establish an oral trust or any of its terms *at the time* or *after the time*. Only loose conversation was offered (over objection) to create a false impression that the decedent-insured said that his two children were taken care of *before the time*, which was incompetent, irrele-

vant, immaterial, hearsay or untrue. But even if that testimony were competent, relevant, material, admissible and true, it could not possibly have established a trust.

A parol trust of personalty must be established by clear and convincing evidence, *as to its existence and all of its terms. Allen v. Withrow,* 110 U. S. 119; *Carillo v. Taylor,* 299 P. 2d 188, 81 Ariz., 14; *Muriello v. Hernandez,* 281 P. 2d 786, 79 Ariz., 1; *Stewart v. Schnepf,* 158 P. 2d 529, 62 Ariz., 440; *Costello v. Cunningham,* 147 P. 701, 16 Ariz., 447; 23 A.L.R. 1500, p. 1528; 20 Am. Jur., Evidence, sec. 1253; 32 C.J.S., Evidence, par. 1023. Furthermore, there is no evidence that your petitioner ever accepted any such alleged trust, either expressly or constructively.

All of the elements of a trust must be proved by a very high degree of proof; and if any of the elements is missing, that is fatal to the trust. 54 Am. Jur. Trusts, sec. 30. *Carillo v. Taylor, supra.*

Assuming *arguendo* that the respondents' testimony did (through some inconceivable elasticity of the law) establish a trust, then the supposed trust would positively have been revoked by the subsequent outright transfer to your petitioner. *The law on that point of revocation is elementary.*

Furthermore, an insurance policy must be interpreted by first looking to the language of the contract; and where the terms thereof, as here, are not contradictory, the parol evidence rule excludes testimony, as offered here, to vary or contradict the terms of the integrated writings such as petitioner's contracts of insurance.

It was utterly impossible, therefore, for the guardian ad litem to have established a trust created *at any time*. Nevertheless it was the erroneous judgment of District Judge Ling that the respondents herein "are the sole equitable owners of the proceeds of those certain insurance policies". Upon consideration of your petitioner's Objections, the learned District Judge should have entered the Findings of Fact, Conclusions of Law and Judgment requested on his behalf.

V. District Judge Ling Was Without Jurisdiction Or Right To Enter An Affirmative Judgment Against Petitioner.

The most that the learned Arizona District Judge could have awarded to the respondents was the interpleaded fund then in the registry of his Court. Nonetheless Judge Ling entered an affirmative judgment for them against your petitioner.

The fund originally paid into the registry of the Western Pennsylvania District Court was $27,456.38; and that is the amount of the Judgment against your petitioner "together with interest thereon at the rate of six per cent per annum from June 16, 1953 until paid, together with their costs herein incurred". The interest thereon already is substantially in excess of $12,000.00; and your petitioner is without information as to their costs. However, the Pennsylvania District Court, prior to transfer of the cause, awarded fees and costs from the interpleaded fund at Pittsburgh (another dangerous precedent): $1,000.00 to William H. Eckert, Esquire, counsel for the insurer, for interpleading it, and $1,500.00 to Loyal H. Gregg, Esquire, guardian ad litem,

said motion should have been granted as a matter of law, as it was apparent from the record that the alleged oral trust was unprovable. Full support for this proposition developed at the trial, wherein there was not even an attempt to establish an oral trust or any of its terms at or after the time of the absolute transfer of the policies to your petitioner, and only loose talk was offered about events before the time, which, even if true, was incompetent, irrelevant, immaterial and hearsay.

Furthermore, even if the testimony feebly offered were true, competent, relevant, material and admissible, and also were legally sufficient to establish an oral trust and all of its terms, such a trust would have been revoked by the subsequent assignments and outright transfer of the policies to your petitioner.

VIII. The Court of Appeals Erred In Dismissing The Appeal.

The Motion to Dismiss the appeal in its entirety is as follows:

"Appellees respectfully move that the appeal herein be dismissed based upon the fact that Appellant has not perfected his appeal by filing and serving a statement of the points upon which he intends to rely and a designation of the portions of the record material to the consideration of the appeal as required by Rules 75 (a) and 75(d) Federal Rules of Civil Procedure, and by Rule 17 of the Rules of Procedure of the United States Court of Appeals for the Ninth Circuit."

It is obvious from the record that said motion is a misrepresentation because the appeal was duly perfected in strict compliance with the applicable Federal Rules of

Civil Procedure, including Rule 75. The only somewhat accurate averment in the Motion to Dismiss concerns noncompliance with Court Rule 17 on prosecution of the appeal; but it is elementary that the Court is not bound by its own Rules. Futhermore, Rule 17 of that Court was then inapplicable due to the pendency of preliminary motions. It necessarily follows that the motion was entirely untenable and insupportable. Incidentally, the Motion to Dismiss failed to comply with Rule 15 of the Court of Appeals, and particularly because it was not supported by affidavits.

The Motion to Dismiss was predicated upon delay due to presentation, consideration and disposition of preliminary motions, most of which delay was occasioned by the respondents themselves, beginning with their first Motion to Dismiss dated November 19, 1959. That motion was denied on February 10, 1960 (App. 4). after which the respondents as appellees therein had their Appearance of Counsel entered February 18, 1960. *Accordingly, the first three months of litigating in the Court of Appeals was consumed by the respondents' insupportable, untenable, dilatory motion to dismiss.*

After the said delay of three months chargeable to the respondents for their first motion to dismiss, their second motion to dismiss was filed on April 7, 1960, only seven weeks later, at which time they charged your petitioner with all delay, failing to make any mention whatever of their first motion to dismiss and its concomitant delay of three months. Although your petitioner had proceeded with two preliminary motions during that brief period of seven weeks, nevertheless the respondents persuaded the Court of Appeals.

No authorities were submitted in support of their Motion to Dismiss the appeal. They simply cited three inapplicable cases, by reason of which their motion actually should have been denied. (*Beecher v. Smithson*, C. A. 9, 1953, 205 F. 2d 113; *Beecher v. Leavenworth State Bank*, C. A. 9, 1954, 214 F. 2d 114; *Hargraves v. Bowden*, C. A. 9, 1954, 217 F. 2d 839).

In opposition to the Motion to Dismiss the appeal, your petitioner submitted many applicable authorities which established beyond question the point that the motion should be denied.

The decision of the Ninth Circuit in *Maloney v. Hammond*, C.A. 9th, 1948, 171 F. 2d 225, citing *Pyramid Motor Corp. v. Ispass, et al.*, 67 S. Ct. 954 (1947), conflicts with its decision dismissing the instant appeal. In that case the Court observed (226-227) that, as in the instant case, "No one contends that the appeal is without merit . . ."; and held that dismissal on motion is not appropriate.

Your petitioner's contention is further supported by that Court's decision in *Johnson v. Wilson*, C. A. 9th, 1941, 118 F. 2d 557, wherein it denied a motion to dismiss the appeal, holding (588): "Since the record presents a strongly arguable claim of error and the delay is not shown to have prejudiced the appellee, we consider the appeal . . .". Cited therein was *Ainsworth v. Gill Co.*, 104 F. 2d 83, 3rd Cir., 1939, wherein the Court held (85): "The motion to dismiss the appeal is accordingly denied and the appellant is given leave nunc pro tunc to file the record on appeal in this Court . . .". Such holding should apply *a fortiori* in the instant case.

Assuming *arguendo* the tenability of the said motion to dismiss, that Court, had it not been for counsel's misrepresentations, would have followed its attitude as expressed in *Pacific Coast Marine Ass'n v. Coastwise Line*, C. A. 9th, 1948, 171 F. 2d 284, where it held, in denying a motion to dismiss, that the delay of a day after the time permitted by valid extension in docketing the record, is a matter *de minimis*.

See also *Mutual Benefit Ass'n., v. Snyder*, 109 F. 2d 469, C. A. 6th, 1940; *Phillips v. Insurance Co.*, 239 F. 2d 79, 5th Cir., 1956; *Stumpf v. Matthews*, 195 F. 2d 25, C.A.D.C., 1951. Really applicable herein are the principles authoritatively set forth in 5 C.J.S. 441: An appeal will not be dismissed for want of prosecution where the record discloses want of jurisdiction in the court below; where both appellant and appellee were equally the cause of delay; where the record has been perfected and the appeal can be disposed of on the merits; and where the ends of justice would be defeated thereby.

IX. The Judgments Sought To Be Reviewed Conflict With The Law Of The Various Circuits And With Applicable Decisions Of This Court.

No authorities need to be cited to prove this point. The judgments are so clearly erroneous that they even conflict with the law of the Circuit wherein they were rendered. The learned Judges of the lower Courts were indeed laboring under a misapprehension of the Federal Rules of Civil Procedure, the law applicable thereto, and the constitutional guarantees of due process of law, when they handed down the decisions hereinabove set forth.

X. This Is A Case Of National Importance.

The judgments sought to be reviewed herein will be reversed. Otherwise the law of the Circuit Courts and that of this Court would soon receive the same "scrap of paper" treatment of trusts, estates and insurance policies, as was done in the instant case.

This Honorable Court has repeatedly declared that it is charged with supervisory powers and functions through which it hastens to set aside judgments that are void for fraud, "to see that the waters of justice are not polluted".

In the case of *Hazel-Atlas Glass Co. v. Hartford-Empire Co., supra*, Mr. Justice Black, who delivered the Opinion of the Court, discussing the issue of the fraud perpetrated therein, stated (246), "This matter does not concern only private parties. . . . Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society".

CONCLUSION

There are many impelling reasons why the instant cause should be reviewed,—the conflicts, the fraud, the public importance. The conflicts should be resolved. The fraud should be cleansed. The public should be protected.

This petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL GINSBURG,
Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL GINSBURG, Appellant,

v.

BONN KRAUS GINSBURG and JOHN PAUL GINSBURG, Minors, by their Guardian Ad Litem, BETTY K. GINSBURG, Appellees

No. 16,768
Feb. 10, 1960

On Motion to Dismiss an Appeal from the United States District Court for the District of Arizona

Opinion

Before: STEPHENS, BARNES and KOELSCH, Circuit Judges

KOELSCH, Circuit Judge:

Appellees move to dismiss this appeal on the ground that "appellant has not filed a notice of appeal from a final decision of the district court."

Briefly, the record reveals that the Mutual Life Insurance Company of New York commenced an interpleader action in the District Court of the United States for the Western District of Pennsylvania to require appellees and appellant to litigate their respective claims to the proceeds of several policies of life insurance. After depositing the proceeds with the court the company was discharged. An issue was then framed between the adverse claimant, appellees as plaintiffs and appellant as defendant. On motion of appellees, resisted by the appellant, the suit was then transferred to the United States District Court for the District of Arizona where trial to the Court was held. After the Court had announced that judgment would be entered for appellees, appellant moved to re-transfer the cause, and this motion was denied. On June 19, 1959, Findings of Fact

and Conclusions of Law were filed and judgment favorable to appellees was entered. This judgment was based upon a single claim jointly asserted by the appellees and rendered jointly in their favor for the entire sum claimed; appellant recovered nothing.

On June 27, 1959, appellant filed a "Motion for New Trial; for Reconsideration of Motion to Retransfer the cause for lack of Jurisdiction; and to Vacate and set aside Findings, Conclusions, Order and Judgment." This motion was denied in its entirety by a minute order of the Court made September 21, 1959, and on October 20, 1959, appellant filed a notice of appeal which in its entirety reads as follows:

> Notice is hereby given that Paul Ginsburg, the above named Interpleaded Defendant hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of Court entered in this action on the 21st day of September, 1959.

Appellees contend in substance that since by the plain provisions of 28 U.S.C. § 1291 this court is only vested with jurisdiction to consider appeals from "final decisions" of district courts, and since appellant in the above notice is appealing only from an order denying motions for a new trial, to re-transfer the cause and to set aside judgment, the appeal must be dismissed because none of such orders constitutes a final decision from which an appeal will lie.

However, though it is true that none of the orders referred to in the notice of appeal before us constitutes a final decision, we nevertheless believe that appellees' motion to dismiss is not well taken for the reason that appellant's notice of October 20, 1959, is in fact a notice of appeal from the judgment of June 19, 1959.

Rule 73, so far as pertinent here, provides that "(a)—A party may appeal from a judgment by filing with the district court a notice of appeal—" and "(b) The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal it taken—." As already indicated, appellant was a party to the suit. He filed a notice of appeal in the district court; the notice specified that it was he who was taking this appeal and that the appeal was being taken to this court. However, the notice did not designate that the appeal was from a final decision in the case but rather (by reference) designated the appeal to be from the order denying his motion for new trial, to set aside the judgment and to re-transfer.

When the notice of appeal was filed there was a final decision— the judgment entered June 19, 1959.

The language of the notice we believe is such as to leave us two alternatives: first, we can perfunctorily accept the literal statement therein that the appeal is from the order denying the motion for new trial and to set aside the judgment; this approach will lead to the inevitable conclusion that the appeal must be dismissed; or, secondly, we can look to the nature of these two motions and consider the effect that either, if granted, would have had on the judgment, and from this infer that appellant by his notice of appeal actually intended to and in fact was attacking the judgment itself.[1] This

---

1. It should be noted that there can be no uncertainty as to the particular judgment referred to in the notice of appeal since as already pointed out the judgment of June 19, 1959, in favor of appellees jointly was the only judgment entered.

latter approach appeals to us as more compatible with the spirit of the statutory admonition contained in 28 U.S.C. § 211 that "[o]n the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties", than would a policy of adherence to a strict construction of Rule 73(b).[2] Hoiness v. United States, 335 U.S. 297 (1953); United States v. Arizona, 206 F.2d 160, 161-2 (9th Cir., 1953), (Pope, J. dissenting), rev'd, 346 U.S. 907 (1953); Nolan v. Bailey 254 F.2d 638 (7th Cir., 1958).

In sum, to employ the language used by the Court of Appeals of the Fifth Circuit in Atlantic Coast Line R. Co. v. Mims, 199 F.2d 582, 583 (1952): "[w]hile we agree with appellees that an appeal from an order overruling a motion for new trial will not lie, we agree with appellant that though the order appealed from was misnamed it clearly enough appears from the record as a whole that the intent was to appeal from the judgment and that the intent should be given effect."

The motion to dismiss appeal is denied.

(Endorsed) Opinion filed Feb. 10, 1960.

FRANK H. SCHMID, Clerk.

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2. Rule 61 might also be mentioned. This rule likewise announces the doctrine of harmless error. As Prof Moore says in his work on Federal Practice: "Technically Rule 61 is only a mandate to the district court since the Supreme Court was only given authority for the base line courts. But there is no doubt that the Court's view on harmless error, as expressed in the Rule are gladly followed by the courts of appeals as expressive of the best practice." 7 Moore, Federal Practice § 61.11, at 1030 (2 ed. 1953).

Order Submitting Motion to Vacate and Motion to Dismiss, etc.

The motions of the respective parties coming on for hearing or submission, and there being no appearance in open court on behalf of either party, ORDERED (1). motion of appellant to open up and vacate the order of the District Court appealed from, etc., and (2). motion of appellees to dismiss the appeal submitted to the court for consideration and decision.

On consideration thereof, IT IS FURTHER ORDERED that (1). the motion to dismiss the appeal be, and hereby is continued for hearing to May 9, 1960, and (2). that the motion of appellant to open up and vacate the District Court orders appealed from, and to retransfer and remand the cause to the Pennsylvania District for trial be, and hereby is denied.

Filed and entered: April 11, 1960.

Order Dismissing Appeal

The motion of appellee for dismissal of the appeal in above cause coming on for hearing and presented by Mr. Phillip A. Robbins, counsel for the appellee and there being no appearance in open Court on behalf of appellant and submitted on papers in opposition thereto, IT IS ORDERED that the motion to dismiss be, and hereby is granted, that the appeal be and hereby is dismissed and that a judgment of dismissal be filed and entered accordingly.

Judgment

Appeal from the United States District Court for the District of Arizona.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona, and on motion of Appellees to dismiss the appeal herein, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the motion to dismiss be, and hereby is granted, and that the appeal in this cause be, and hereby is dismissed.

(ENDORSED) Judgment

Filed and entered: May 9, 1960.

FRANK H. SCHMID, Clerk

FILE COPY

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FILED
DEC 19 1960
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM 1960

No. 551

PAUL GINSBURG, *Petitioner*

v.

BESS KEATS GINSBURG and JOHN PAUL GINSBURG, Minors, by their Guardian Ad Litem, BETTY K. GINSBURG, *Respondents*

Brief of Respondents in Opposition to Petition for Writ of Certiorari

JAMES R. MOORE
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PHILIP A. ROBBINS
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Attorneys for Respondents

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In the Supreme Court of the United States

OCTOBER TERM 1960

No. 551

PAUL GINSBURG, *Petitioner*

v.

BONN KRAUS GINSBURG and JOHN PAUL GINSBURG, Minors, by their Guardian Ad Litem, BETTY K. GINSBURG, *Respondents*

Brief of Respondents in Opposition to Petition for Writ of Certiorari

I.

QUESTIONS PRESENTED FOR REVIEW

1. Is an order of the Court of Appeals denying a preliminary motion by petitioner to "Open up and Vacate the District Court Orders Appealed From and to Retransfer and Remand the Cause to the Pennsylvania District Court for Trial" reviewable on certiorari?

2. Did the Court of Appeals abuse its discretion in ordering petitioner's appeal dismissed for failure to perfect the same by refusing to comply with the rules of the Court of Appeals?

II.

STATUTES AND RULES INVOLVED

U. S. Code, Title 28, U.S.C.A. Rules for the Ninth Circuit, Rule 17 (6):

> "In all cases, including those on petition for review to enforce or to set aside an order of a United States Board or Commission, the appellant or petitioner, upon the filing of the record in this court, shall file with the clerk a concise statement of the points on which he intends to rely. With such statement the appellant or petitioner shall file a designation of all of the record which is material to the consideration of the appeal or review and forthwith serve on the adverse party a copy of the statement and designation . . ."

III.

STATEMENT OF THE CASE

Although petitioner's Statement of the Case is almost entirely inaccurate, it is unnecessary to dwell thereon since most of the statements therein are neither material nor relevant to the instant petition for certiorari. The only matters pertinent to a determination of this petition are contained in the record of proceedings that occurred in the Court of Appeals for the Ninth Circuit. These proceedings are a part of the record herein, having been designated as Volume 3 of the record by the Clerk of the Court of Appeals. (Particular documents therein will be referred to by name, date and the document number assigned by the Clerk in his Index.)

The record reveals that the entire record of the proceedings in the United States District Court for the District of Arizona was transmitted and certified to the Court of Appeals for the Ninth Circuit on January 15, 1960. On February 10, 1960, immediately following disposition by the Court of Appeals of a preliminary motion (Document No. 3), the clerk of the Court of Appeals advised appellant that he must, pursuant to the Court's Rule 17 (6), immediately serve and file a statement of points and designation of record.

Instead petitioner on February 23, 1960, filed a Motion for Stay of Proceedings. (Document No. 4) This motion was denied on March 18, 1960. (Document No. 6) Following denial of this motion, petitioner still refused to comply with Rule 17 (6), filing instead a "Motion to Open Up and Vacate the District Court Orders Appealed from and to Retransfer and Remand the Cause to the Pennsylvania District Court for Trial". (Document No. 7) This motion was denied by the Court on April 11, 1960. (Document No. 12)

On April 5, 1960, there still having been no compliance with Rule 17 (6), respondents filed a Motion to Dismiss the appeal based upon petitioner's failure to perfect the same. (Document No. 9) Upon petitioner's request, the hearing on this matter was postponed and set for May 9, 1960 in San Francisco. Petitioner filed still another motion for a stay of proceedings on April 29, 1960 (Document No. 13) which was denied by the Court of Appeals on May 4, 1960. (Document No. 17) On May 9, 1960 counsel for respondent appeared and presented the Motion to Dismiss to the court. Petitioner did not appear either in person or by counsel. At this time, he had still failed to comply with Rule 17 (6). The Court of Appeals thereupon dismissed the

appeal. (Document No. 18) (In addition, this Court itself twice denied motions of petitioner to stay proceedings in the Ninth Circuit prior to the dismissal of petitioner's appeal. The first such motion was presented on November 13, 1959, the second on May 5, 1960. Both were denied forthwith.)

IV.

REASONS FOR DENYING WRIT

1. The Court of Appeals properly denied petitioner's "Motion to Open Up and Vacate the District Court Orders Appealed From and to Retransfer and Remand the Cause to the Pennsylvania District Court for Trial."

2. The Court of Appeals properly exercised its discretion in dismissing petitioner's appeal for failure to comply with Rule 17 (6).

V.

ARGUMENT

1. Denial of Petitioner's "Motion to Open Up and Vacate the District Court Orders Appealed from and to Retransfer and Remand the Cause to the Pennsylvania District Court for Trial".

The Court's denial of this motion raises none of the grounds specified in Rule 19 (b), *Revised Rules of the United States Supreme Court*, as reasons for granting certiorari.

The Court of Appeals correctly denied this motion for the reason that it was without any supporting basis in the record and presented issues, which if properly raised at all, were determinable only upon a review of the judgment appealed from and not by way of a preliminary motion. None of the matters raised in Questions 1-5 of petitioner's brief (pages 2-4) were ever properly presented to the Court of Appeals and should not be considered as grounds for granting certiorari.

Furthermore, the matters urged in support of the instant petition have previously been urged unsuccessfully upon this Court in *Ginsburg v. Gourley*, No. 663, October Term, 1959.

2. Judgment of May 9, 1960 Dismissing the Appeal.

Failure to serve and file the required statement of points and designation of record constitutes a failure to perfect the appeal and is grounds for dismissal of the appeal. *Beecher v. Smithson* (C.A. 9, 1953), 205 F.2d 113; *Beecher v. Leavenworth State Bank* (C.A. 9, 1954), 214 F.2d 114; *Hargraves v. Bowden* (C.A. 9, 1954), 217 F.2d 839. This has been held especially true where, as here, an appellant has already prolonged the litigation in an unwarranted manner. *Beecher v. Leavenworth State Bank*, supra.

When respondents' motion to dismiss the appeal was presented, considered and granted almost three months had elapsed since respondents' preliminary motion had been disposed of and petitioner had been notified by the Court of Appeals to file immediately his statement of points and designation of record. Petitioner had been denied a stay of proceedings by the Court of Appeals twice and by this Court twice. Nevertheless, petitioner persisted in his refusal to comply with Rule 17 (6). Clearly it was within the discretion of the Court of Appeals to dismiss petitioner's appeal for failure to so comply.

Petitioner's contention that the dismissal was obtained by misrepresentations on the part of respondents is without any foundation whatever. The same record now before this Court was before the Court of Appeals when respondents' motion to dismiss was considered and granted, as well as when petitioner's motion for rehearing was considered and denied. The portions of the record referred to in respond-

ents' Statement of the Case, supra, fully support the action of the Court of Appeals.

Finally, petitioner's argument that he was excused from compliance with Rule 17 (6) by filing a series of preliminary motions in the Court of Appeals or by filing petitions for certiorari in this Court is without merit. Were petitioner's contention true, then he would have it in his power to prevent a determination of the appeal indefinitely.

(Petitioner's continuous efforts since 1953 to delay and protract this litigation are set out in part in the memorandum filed by respondents on February 27, 1960 in the Court of Appeals.) (Document No. 5) The Court's attention is respectfully directed to this memorandum and particularly to pages 2 through 9 thereof.)

Respondents respectfully submit that the Petition should be denied.

Respectfully submitted,

JAMES R. MOORE
ELIAS M. ROMLEY
PHILIP A. ROBBINS
Attorneys for Respondents

Of Counsel:
MOORE & ROMLEY

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FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 551

PAUL GINSBURG, Petitioner,

v.

BONN KRAUS GINSBURG and JOHN PAUL GINSBURG, Minors, by their Guardian Ad Litem, BETTY K. GINSBURG, Respondents.

PETITIONER'S REPLY BRIEF

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PAUL GINSBURG
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 551

PAUL GINSBURG, Petitioner,

v.

BONN KRAUS GINSBURG and JOHN PAUL GINSBURG, Minors, by their Guardian Ad Litem, BETTY K. GINSBURG, Respondents.

PETITIONER'S REPLY BRIEF

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Brief of Respondents in Opposition to Petition for Writ of Certiorari could not comply with paragraph 1 of Rule 24 of this Court, and it failed to comply therewith, because it does not disclose "any matter or ground why the cause should not be reviewed by this Court".

The respondents' repeated asseveration that your petitioner failed to perfect the appeal is refuted by the record which shows that the appeal was indeed perfected in every respect. Respondents' futile claim

could only be the result of their misapprehension and confusion on the difference between perfecting and prosecuting an appeal. Since the appeal was perfected they could argue only that the appeal was not prosecuted by full compliance with Rulee 17(6) of the Court of Appeals; but such argument would be untenable and insupportable because compliance with Rule 17(6) is suspended pending the disposition of the preliminary motions then before that Court, and the Clerk of the Court of Appeals agreed with your petitioner on that point. It necessarily follows, because the Order of dismissal failed to contain any ground therefor and it was not accompanied by an Opinion, that the respondents' assumption (p. 4) that "The Court of Appeals properly exercised its discretion in dismissing petitioner's appeal for failure to comply with Rule 17(6)" is wholly without foundation. On the contrary, the only logical explanation for the dismissal would be that it was grounded on respondents' misrepresentation in the motion to dismiss that "Appellant has not perfected his appeal by filing and serving a statement of the points upon which he intends to rely and a designation of the portions of the record material to the consideration of the appeal as required by Rules 75(a) and 75(d) Federal Rules of Civil Procedure"; and that the Court of Appeals accepted their misrepresentation as true instead of relying upon the record. Had the Court of Appeals examined the reecord, the Court would have found that your petitioner had fully complied with F.R.C.P. Rule 75 in perfecting the appeal, and that the appeal was entirely meritorious. Thus their argument (p. 4) that "None of the matters raised in Questions 1-5 of petitioner's brief (pages 2-4) were ever properly

presented to the Court of Appeals" must fail, because all of those matters fully support petitioner's point that the appeal was wholly meritorious and that, therefore, the dismissal constituted an abuse of discretion. Assuming *arguendo* that the respondents really had a technical ground for dismissal of the appeal, the dismissal still would constitute an abuse of discretion.

Similarly their argument (p. 5) that "Furthermore, the matters urged in support of the instant petition have previously been urged unsuccessfully upon this Court in *Ginsburg v. Gourley*, No. 663, October Term, 1959" should be taken *cum grano salis* not only because it is inaccurate, as the only issue therein was the respondents' fraud upon the Court; but also because this Court has repeatedly pronounced that the denial of certiorari does not imply approval of the judgment sought to be reviewed or of its supporting opinion.

Evidently the respondents are still trying to dodge the underlying issue of fraud presented herein, and they are advocating that this Court do likewise. That could be one reason why they opened their Statement of the Case (p. 2) with the unfounded and puerile charge that "petitioner's Statement of the Case is almost entirely inaccurate", without any detailing or specifying of which statements, if any, are inaccurate and which are admittedly accurate.

The cases cited by respondents in their Argument 2 (p. 5) are not authority for their proposition and do not legally support the dismissal of the appeal. Their reprehensible assertion (p. 5) that your petitioner "has already prolonged the litigation in an unwarranted manner" is a deliberate misrepresentation to this Honor-

able Court of the various prior proceedings forced upon your petitioner by them in order to vex, hinder and delay your petitioner in securing justice through cleansing of their frauds. Furthermore, their representation (p. 5) that "petitioner had been notified by the Court of Appeals to file immediately his statement of points and designation of record" is untrue. Your petitioner was never so notified by the Court.

Conspicuous by absence from the respondents' brief is any legal opposition whatever to the wealth of authorities cited by your petitioner in support of his Reasons Relied on for the Allowance of the Writ. Furthermore, it is significant that their brief fails to submit any denial of their fraud.

CONCLUSION

In view of the record fraud herein and the resulting injustice to your petitioner, the least relief to which he is entitled would be this Honorable Court's vacating of the judgments of the Court of Appeals sought to be reviewed; then remanding the cause to the Arizona District Court with instructions to retransfer the cause to the Pennsylvania District Court for trial.

Respectfully submitted,

PAUL GINSBURG
Counsel for Petitioner
Carlton House
550 Grant Street
Pittsburgh 19, Pennsylvania

Dated: 30 December 1960.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 551

PAUL GINSBURG, Petitioner,

v.

BONN KRAUS GINSBURG and JOHN PAUL GINSBURG, Minors, by their Guardian Ad Litem, BETTY K. GINSBURG, Respondents.

MOTION TO REMAND

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Counsel for Petitioner

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550 Grant Street
Pittsburgh 19, Pennsylvania

SMITH BROS. CO. INC., LAW PRINTERS, 434-436 BLVD. OF ALLIES, PITTSBURGH 19, PA.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 551

PAUL GINSBURG, Petitioner,

v.

BONN KRAUS GINSBURG and JOHN PAUL GINSBURG, Minors, by their Guardian Ad Litem, BETTY K. GINSBURG, Respondents.

MOTION TO REMAND

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Paul Ginsburg, respectfully moves this Honorable Court to vacate its Order entered on January 9, 1961, denying his petition for writ of certiorari (*United States of America, Petitioner, v. The Ohio Power Company*, 353 U. S. 98, 1957); then to grant the petition for writ of certiorari and vacate the Orders of the Court of Appeals sought to be reviewed and thereupon to reverse the Orders and Judgment of the District Court, and remand (28 U. S. C., section 2106) the above entitled case to the United States District Court for

the District of Arizona at Phoenix, with directions to retransfer the cause to the United States District Court for the Western District of Pennsylvania for further proceedings (*United States of America, Petitioner, v. Shotwell Manufacturing Company, et al.*, 355 U. S. 233, 1957, citing and relying upon *Communist Party v. Subversive Activities Control Board*, 351 U. S. 115, and *Mesarosh v. United States*, 352 U. S. 1); and in support hereof avers:

1. On January 9, 1961, upon consideration of the Petition for Writ of Certiorari, the Brief of Respondents in Opposition thereto, and Petitioner's Reply Brief, this Honorable Court denied the petition.

2. Since the said denial of certiorari herein, there have been filed on behalf of your petitioner in the United States District Court for the Western District of Pennsylvania at Civil Action No. 11521 (wherein the instant proceeding was commenced): a Motion Under F. R. C. P. Rule 15 (b, c) for Leave to File Amended Answer to Motion for Change of Venue (with the Amended Answer and Affidavit in Support thereof attached), to which an Answer has been filed; and a Motion Under F. R. C. P. Rule 60 (b) to Open and Vacate Orders of Court.

3. The said Amended Answer to Motion for Change of Venue conforms to the evidence and testimony adduced upon trial of the cause in the Arizona District Court at Phoenix, making it evident that the Motion for Change of Venue fails to comply with any of the requirements of 28 U. S. C., section 1404(a), and that the essential allegations therein are fraudulent misrep-

resentations, thus requiring dismissal of the Motion for Change of Venue.

4. The said motion under Rule 60(b) seeks to open and vacate the Orders of Court transferring the cause from the Western Pennsylvania District to the Arizona District for the reasons that the Orders were procured and entered through fraud upon the Court as well as upon your petitioner; the Orders were obtained and entered through misconduct of petitioner's adversaries; the said fraud and misconduct were after discovered at the trial, as is evidenced in the Official Transcript of the Proceedings in the Arizona District Court at Phoenix; it is not equitable or legal that said Orders of Court should have any effect, and petitioner should be relieved from the operation of said Orders.

5. The issues raised in the said motions have never been ruled upon or adjudicated on the merits by any Court. The only apparent justification for this Court's refusal to review and adjudicate such serious issues (including the record fraud), and then resolve the conflicts entered thereby, may have been the absence of a record basis for review which petitioner presently seeks to establish in the Western Pennsylvania District Court, the only lower court of competent jurisdiction. Otherwise, there remain of record herein undenied, unchallenged and unreviewed assertions of fraud, illegal transfer of the cause, denials of due process of law, illegal dismissal of appeal, affirmative judgments in an interpleader proceeding, unruly conflicts, *et cetera,* all of which may lead to unwarranted implications that such serious situations have been overlooked by this Honorable Court. Therefore, having denied the petition for

writ of certiorari, this Honorable Court should grant this Motion to Remand.

6. Your petitioner is quite aware of the fact that this Supreme Court is only a Court of review, and is not a Court of justice; and that under paragraph 1 of Rule 19 "A review on writ of certiorari is not a matter of right but of sound judicial discretion, and will be granted only where there are special and important reasons therefor". Nobody learned in the law, however, would sincerely deny that the character of petitioner's ten Reasons Relied On For The Allowance Of The Writ is such as to require an exercise of discretion in favor of review; and that an exercise of discretion against review is neither sound nor judicial; unless, of course, the cause is not yet ripe for review by reason of the lack of record basis which will be corrected through the granting of the instant Motion to Remand. A meticulous regard for the honor of the fair administration of justice in the Federal System, therefore, requires the granting of this motion.

Respectfully submitted,

PAUL GINSBURG
Counsel for Petitioner
Carlton House
550 Grant Street
Pittsburgh 19, Pennsylvania

Dated: 24 January 1961.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 551

PAUL GINSBURG, Petitioner,

v.

ROXY KRAUS GINSBURG and JOHN PAUL GINSBURG, Minors, by their Guardian Ad Litem, BETTY K. GINSBURG, Respondents.

AMENDMENT TO MOTION TO REMAND

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 551

PAUL GINSBURG, Petitioner,

v.

BONN KRAUS GINSBURG and JOHN PAUL GINSBURG, Minors, by their Guardian Ad Litem, BETTY K. GINSBURG, Respondents.

AMENDMENT TO MOTION TO REMAND

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Paul Ginsburg, hereby files Amendment to Motion to Remand pending herein, by adding the following averments to those already contained in the Motion to Remand as originally filed:

7. On February 9, 1961 petitioner herein appeared in open Court before Hon. Wallace S. Gourley, Chief Judge of the United States District Court for the Western District of Pennsylvania, and requested the jurist to make application to the Clerk of this Honorable Court

for the original records on file herein, so that proper consideration and disposition could be had of the motions pending before Judge Gourley, which are to be heard on February 27, 1961.

8. The said motions pending before Judge Gourley are described in paragraphs 2, 3, 4 and 5 of the instant Motion to Remand, and they should be adjudicated on the merits.

9. Your petitioner then stated to Judge Gourley that he was informed the Clerk of this Honorable Court would honor such an application under paragraph 2 of Rule 1 of the Rules of this Court. The jurist, nevertheless, firmly and positively refused to make an application for the records, his stated reason being that he had already adjudicated all of the issues involved.

10. Your petitioner then reminded Judge Gourley that the issues involved in said motions relate to the respondents' fraud upon the Court as well as upon petitioner; and that those issues have never been adjudicated by him or by any other Court, as averred in the opening sentence of paragraph 5 of the instant Motion to Remand.

11. Petitioner specifically reminded Judge Gourley, without avail, that he had refused to adjudicate those issues because he was without jurisdiction, which decision necessitated proceedings in this Honorable Court on certiorari at No. 663 October Term, 1959, in the case of Paul Ginsburg, petitioner, v. Hon. Wallace S. Gourley, respondent, which proceedings are incorporated herein by reference thereto. Particular reference in that proceeding is made to the Appendix where Judge Gourley stated (p. 3), "I cannot help conclude that the United

States District Court for the Western District of Pennsylvania is without jurisdiction"; and where Judge Gourley concluded his Order (p. 4), "refused for the reason this Court has no jurisdiction."

12. Although the Motion to Remand is self-supporting, this amendment thereto makes it manifest that the motion should be granted *a fortiori*, because the most usual and customary basis for remand is to require further proceedings in the Court where the action was commenced so that all of the issues be considered and adjudicated on the merits, thus providing a record basis for review, if necessary.

13. If this Honorable Court is unable to review the above entitled cause (and the undenied, unadjudicated record frauds therein) for want of a record adjudication thereon, then it would seem that such record should be provided by District Judge Gourley. Otherwise, your petitioner will have been deprived of his guaranteed right to a day in Court in all Courts, not only in the lower Courts but also in this reviewing Court.

14. In the interest of justice, this cause should be remanded so that beyond question the learned District Judge will have the privilege of jurisdiction and the concomitant duty of adjudication.

Respectfully submitted,

PAUL GINSBURG
Counsel for Petitioner
Carlton House
550 Grant Street
Pittsburgh 19, Pennsylvania

Dated: 9 February 1961.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 551

PAUL GINSBURG, Petitioner

v.

WILLIAM GINSBURG and JOHN PAUL GINSBURG, by their Guardian Ad Litem, BETTY K. GINSBURG, Respondents

PETITION FOR REHEARING

to Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PAUL GINSBURG
Counsel for Petitioner

[illegible] Street
19 Pennsylvania

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 551

PAUL GINSBURG, Petitioner,

v.

BONN KRAUS GINSBURG and JOHN PAUL GINSBURG, Minors, by their Guardian Ad Litem, BETTY K. GINSBURG, Respondents.

PETITION FOR REHEARING

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petition for rehearing of Paul Ginsburg, petitioner, respectfully represents:

1. On January 9, 1961, upon consideration of the Petition for Writ of Certiorari, the Brief of Respondents in Opposition thereto, and Petitioner's Reply Brief, this Honorable Court denied the petition.

2. On January 25, 1961, petitioner lodged herein a Motion to Remand which, together with his Amendment to Motion to Remand lodged herein this 11th day of February, 1961, will be submitted to this Honorable Court on or about February 15, 1961, for an adjudication, which will be rendered on or after February 20, 1961.

3. On January 26, 1961, petitioner's Application for Extension of Time Within Which to File Petition for Rehearing was presented to Mr. Chief Justice Warren (in the absence of Mr. Justice Douglas) who, on January 30, 1961, entered an Order extending the time for ten days to and including February 13th, instead of for sixty days as requested. The purpose of said application was to allow a reasonable time for disposition of said Motion to Remand (the granting of which would obviate the need for this Petition for Rehearing) and then for preparation of a petition for rehearing, if necessary.

4. On February 4, 1961, petitioner's Application for Further Extension of Time Within Which to File Petition for Rehearing was lodged herein and presented to Mr. Chief Justice Warren (again in the absence of Mr. Justice Douglas) who, on February 8, 1961, denied it. That application showed that this Petition for Rehearing would have to be filed before there could possibly be an adjudication of the Motion to Remand, and requested an additional thirty days.

5. The denied petition for writ of certiorari *sought review of issues raised under the Constitution and laws of the United States rather than questions of fact;* and review of decisions which entered conflicts with decisions of the instant and other Circuits as well as with applicable decisions of this Court, in a cause of public importance.

6. The petitioner's Motion to Remand, as amended, shows that the only justification for denial of certiorari herein which petitioner can ascertain in the absence of an Opinion of the Court, is that the cause is not yet

ripe for review by reason of the lack of record basis which will be corrected through remand

7. Having denied certiorari, should this Honorable Court also refuse to remand, then your petitioner can only add a plea herein that he has never had a chance, in spite of the fact that under the law he is entitled to two chances,—one in the trial Court and another in the Court of Appeals.

8. In the case of *Dick v. New York Life Insurance Co.*, 359 U. S. 437, both the Opinion of the Court by Mr. Chief Justice Warren and the dissenting Opinion by Mr. Justice Frankfurter support the point that certiorari should be granted herein. Therein the Opinion of the Court covering ten pages (437-447), reversing the judgment sought to be reviewed, simply involved the question of whether the Eighth Circuit properly held that it was error to submit to a jury's determination whether an insured died as a result of suicide or accident. There were no important issues, as herein, like fraud, illegal transfer to a District where the action could not have been brought, deprivations of due process of law, adjudications in advance of the right to be heard and preventing records for review, entry of affirmative judgment in an interpleader action, and conflicts to be resolved.

9. The said dissenting Opinion by Mr. Justice Frankfurter, who would have affirmed, was even longer (447-463) than the Opinion of the Court, and contained a very interesting history of the Evarts Act and the "Judges' Bill". According to a pronouncement by Mr. Chief Justice Taft (452), a litigant is entitled to two chances,—one in the District Court and another in the

Court of Appeals. In the instant Case, petitioner never had a first chance in any lower Court on the issue of fraud; and he never had a second chance in a Court of Appeals on the issue of erroneous transfer of the cause. When that pronouncement added that the Supreme Court's function is to preserve uniformity of decision among the intermediate courts of appeal, it is respectfully submitted that upon this rehearing, certiorari should be granted so that the conflicts entered herein will be resolved.

10. The said dissenting Opinion also contained an important pronouncement (455) by Mr. Chief Justice Hughes, which supports the right to certiorari herein because the questions presented are not questions of fact, but are questions of law.

11. In view of the foregoing, it is respectfully submitted that upon this rehearing, the Court will exercise a legal discretion which is both sound and judicial, and thus grant certiorari.

Wherefore, your petitioner prays that this Honorable Court grant a rehearing.

PAUL GINSBURG,
Counsel for Petitioner.

Dated: 11 February 1961.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay; and that it is restricted to the grounds specified in paragraph 2 of Rule 58.

PAUL GINSBURG,
Counsel for Petitioner.

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Office-Supreme Court, U.S.
FILED
MAR 6 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 551

PAUL GINSBURG, Petitioner,

v.

BONN KRAUS GINSBURG and JOHN PAUL GINSBURG, Minors, by their Guardian Ad Litem, BETTY K. GINSBURG, Respondents.

PETITION FOR REHEARING SUR MOTION TO REMAND

PAUL GINSBURG
Counsel for Petitioner

Carlton House
550 Grant Street
Pittsburgh 19, Pennsylvania

SMITH BROS. CO. INC., LAW PRINTERS, 434-438 BLVD. OF ALLIES, PITTSBURGH 19, PA.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 551

PAUL GINSBURG, Petitioner,

v.

BONN KRAUS GINSBURG and JOHN PAUL GINSBURG, Minors, by their Guardian Ad Litem, BETTY K. GINSBURG, Respondents.

PETITION FOR REHEARING SUR MOTION TO REMAND

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petition for rehearing *sur* motion to remand, pursuant to paragraph 1 of Rule 58, of petitioner, Paul Ginsburg, respectfully represents:

1. On February 27, 1961, this Honorable Court entered an Order denying petitioner's Motion to Remand.

2. The said Motion to Remand authoritatively showed that the above entitled action should be remanded to the United States District Court for the District of Arizona at Phoenix, with directions to retransfer the cause to the United States District Court for the Western District of Pennsylvania for further proceedings.

3. The further proceedings pending in the Western Pennsylvannia District Court at Civil Action No. 11, 521 are petitioner's Motion under F.R.C.P. Rule 15 (b, c) for

Leave to File Amended Answer to Motion for Change of Venue (with the Amended Answer and Affidavit in Support thereof attached), to which an Answer has been filed as well as a Reply to the Answer; and petitioner's unanswered and undenied Motion under F.R.C.P. Rule 60 (b) to Open and Vacate Orders of Court, for having been procured through misconduct of petitioner's adversaries and through fraud upon the Court as well as upon petitioner.

4. The issues raised in the said motions under Rule 15 (b, c) and Rule 60 (b) have never been ruled upon or adjudicated on the merits by any lower Court or by this Court. It is respectfully submitted that the issue of fraud must be adjudicated, to the end that the fraud will be cleansed and purged; because no Court should house a single fraud.

5. Petitioner's Amendment to Motion to Remand showed that Chief Judge Gourley of the Western Pennsylvania District refused to make application to the Clerk of this Court for the records in this case pursuant to paragraph 2 of Rule 1 of this Court, for the asserted reason that he had already adjudicated all of the issues involved. It was also pointed out therein, nevertheless, that Judge Gourley ***had never adjudicated any of said issues on the merits, and had expressly refused to do so*** because he thought he was without jurisdiction, as stated in the jurist's own Opinion of record in this Court at No. 663 October Term, 1959, in the case of Paul Ginsburg, Petitioner, v. Hon. Wallace S. Gourley, Respondent.

6. The Chief Justice and the Associate Justices of this Court should not preclude petitioner from prosecuting the underlying issue of fraud herein where it was originally perpetrated and is unwanted, simply because

they have decided not to review the questions presented and adjudicate the issues involved. It should be pointed out here that the judicially obnoxious judgments of Hon. Dave W. Ling at Phoenix, unsuccessfully sought to be reviewed herein, are currently before the Judiciary Committee of the House of Representatives of the United States in connection with petitioner's Request for Impeachment Proceedings against Judge Ling for the reason that the jurist's actions of misconduct violated the Constitution and laws of the United States.

7. The Honorable, Harlan Fiske Stone, late of this Court, stated, "I have no patience with the complaint that criticism of judicial action involves any lack of respect for the courts. When the courts deal, as ours do, with great public questions, the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their action and fearless comment upon it."

Wherefore, your petitioner prays that this Honorable Court grant a rehearing.

PAUL GINSBURG,
Counsel for Petitioner.

Dated: 2 March 1961

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

PAUL GINSBURG,
Counsel for Petitioner.

MOTION FILED APR 196

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 551

PAUL GINSBURG, Petitioner,

v.

BONN KRAUS GINSBURG and JOHN PAUL GINSBURG, Minors, by their Guardian Ad Litem, BETTY K. GINSBURG, Respondents.

MOTION FOR LEAVE TO FILE THE ANNEXED SECOND PETITION FOR REHEARING AND APPENDIX

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PAUL GINSBURG
Counsel for Petitioner

Carlton House
550 Grant Street
Pittsburgh 19, Pennsylvania

BYRON S. ADAMS PRINTING, INC. — LAW PRINTERS — PITTSBURGH, PA.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 551

PAUL GINSBURG, Petitioner,

v.

BONN KRAUS GINSBURG and JOHN PAUL GINSBURG, Minors, by their Guardian Ad Litem, BETTY K. GINSBURG, Respondents.

MOTION FOR LEAVE TO FILE THE ANNEXED SECOND PETITION FOR REHEARING AND APPENDIX

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Paul Ginsburg, respectfully moves this Honorable Court to enter an Order granting him leave to file the annexed second Petition for Rehearing and Appendix, pursuant to the authority of *United States of America, Petitioner, v. The Ohio Power Company*, 353 U.S. 98, 1957, and in the interest of justice.

Respectfully submitted,

PAUL GINSBURG
Counsel for Petitioner
Carlton House
550 Grant Street
Pittsburgh 19, Pennsylvania

SECOND PETITION FOR REHEARING

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The second petition for rehearing of Paul Ginsburg, petitioner, respectfully represents:

1. On February 27, 1961, the Court entered an Order denying the first Petition for Rehearing.

2. It was then a matter of record herein, through petitioner's Motion to Remand, that after the denial of certiorari and before the denial of rehearing there had been filed on behalf of your petitioner in the United States District Court for the Western District of Pennsylvania at Civil Action No. 11521 (wherein the instant proceeding was commenced): a Motion Under F.R.C.P. Rule 15(b, c) for Leave to File Amended Answer to Motion for Change of Venue (with the Amended Answer and Affidavit in Support thereof attached), to which an Answer was filed; and a Motion Under F.R.C.P. Rule 60(b) to Open and Vacate Orders of Court.

3. The averments of said denied Motion to Remand explained the purposes of the Motions pending below, and then showed that the issues raised therein have never been ruled upon or adjudicated on the merits by any Court. As a result, there remain of record herein undenied, unchallenged and unreviewed assertions of fraud, illegal transfer of the cause, denials of due process of law, illegal dismissal of appeal, affirmative judgments in an interpleader proceeding, unruly conflicts, *et cetera*.

4. It is respectfully submitted in view of the authorities heretofore cited in support of certiorari, that

the only justification for denial of the first Petition for Rehearing could be the pendency of said Motions below which would entitle your petitioner to an adjudication of some of the issues sought to be reviewed herein. *Chief Disrict Judge Wallace S. Gourley of said Western Pennsylvania District has, however, since the first denial of rehearing, entered an Order denying the said motions, which Order dated March 6th, 1961, is appended hereto.*

5. The learned District Court Judge's refusal of the motions is "for the reason that said proceeding is pending in the Supreme Court of the United States and that this Court is without jurisdiction to entertain said motion . . .".

6. It is obvious that when the District Court refuses to entertain the motions because the proceeding is pending in the Supreme Court; and the Supreme Court refuses certiorari because the motions are pending in the District Court; then your trapped petitioner suffers a total deprivation of his *right to a day in Court.*

7. The Constitutional guaranties of due process of law, therefore, require that this Honorable Court retain jurisdiction over the above entitled cause and grant this second Petition for Rehearing.

PAUL GINSBURG,
Counsel for Petitioner

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay; and that it is restricted to the grounds specified in paragraph 2 of Rule 58.

PAUL GINSBURG,
Counsel for Petitioner.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, Plaintiff,

v.

BONN KRAUS GINSBURG and JOHN PAUL GINSBURG, MINORS, BY LOYAL H. GREGG, GUARDIAN AD LITEM, and PAUL GINSBURG, Defendants.

Civil Action No. 11521

Order

AND NOW, this 6th day of March, 1961, upon oral argument, IT IS ORDERED AND DECREED that motion of Paul Ginsburg, defendant, to file Amended Answer to Motion for Change of Venue, pursuant to Rules 15(b) and 15(c) of the Federal Rules of Civil Procedure, will be and hereby is refused for the reason that said proceeding is pending in the Supreme Court of the United States and that this court is without jurisdiction to entertain said motion, the reasons therefore being set forth with greater particularity in the oral opinion of this court of February 27, 1961.

IT IS FURTHER ORDERED AND DECREED that motion of Paul Ginsburg, defendant, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, to open and vacate the Order entered by this court on May 9, 1957, transferring the above proceeding to the United States District Court for the District of Arizona, will be and it hereby is refused for the reason that said proceeding is pending in the Supreme Court of the United States and that this Court is without jurisdiction to entertain said

motion, the reasons therefore being set forth with greater particularity in the oral opinion of the Court of February 27, 1961.

FINALLY, IT IS ORDERED that in the event an appeal is taken from the entry of this order, proceeding of February 27, 1961 shall be transcribed at the expense of Paul Ginsburg, defendant and moving party.

/s/ WALLACE S. GOURLEY, CDJ
Chief Judge

cc: PAUL GINSBURG, ESQ.
LOYAL H. GREGG, ESQ.
EUGENE B. STRASSBURGER, JR., ESQ.

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Office-Supreme Court, U.S.
FILED
MAY
JAMES R.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 551

PAUL GINSBURG, Petitioner,

v.

BONN KRAUS GINSBURG and JOHN PAUL GINSBURG, Minors, by their Guardian Ad Litem, BETTY K. GINSBURG, Respondents.

MOTION TO VACATE ORDER DENYING CERTIORARI AND FOR LEAVE TO FILE THE ANNEXED AMENDMENT TO PETITION FOR WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PAUL GINSBURG
Counsel for Petitioner

Carlton House
550 Grant Street
Pittsburgh 19, Pennsylvania

SMITH-BRUS CO., INC., LAW PRINTERS, 434 4TH AVE., AT ALLEN, PITTSBURGH 19, PA.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 551

PAUL GINSBURG, Petitioner,

v.

BONN KRAUS GINSBURG and JOHN PAUL GINSBURG, Minors, by their Guardian Ad Litem, BETTY K. GINSBURG, Respondents.

MOTION TO VACATE ORDER DENYING CERTIORARI AND FOR LEAVE TO FILE THE ANNEXED AMENDMENT TO PETITION FOR WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Paul Ginsburg, respectfully moves this Honorable Court pursuant to the authority of *United States of America, Petitioner, v. The Ohio Power Company*, 353 U. S. 98, 1957, to vacate its Order entered herein on January 9, 1961, denying his petition for writ of certiorari; and then to insure full consideration hereof, to enter an Order granting him leave to file the annexed Amendment to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit; and thereupon to grant his petition for writ of certiorari as amended, in the interest of justice.

Respectfully submitted,

PAUL GINSBURG
Counsel for Petitioner

Carlton House, 550 Grant Street,
Pittsburgh 19, Pennsylvania

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 551

PAUL GINSBURG, Petitioner,

v.

BONN KRAUS GINSBURG and JOHN PAUL GINSBURG, Minors, by their Guardian Ad Litem, BETTY K. GINSBURG, Respondents.

AMENDMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Paul Ginsburg, petitioner, hereby makes the following amendment to his Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The entire Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and all of its contents shall remain as originally filed; and in addition thereto petitioner hereby adds to the ten Reasons Relied On For The Allowance of The Writ therein, the following:

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

XI. The Judgment of the Court of Appeals Granting a Fraudulent Motion to Dismiss, Presented During Pendency of Appellant's Motion Therein for Specific Relief, Deprived Petitioner Discriminatorily of his Right to a Chance as assured by the Evar's Act and the "Judges' Bill".

As pronounced by the late Mr. Justice Taft, a litigant is entitled to two chances,—one in the District Court and another in the Court of Appeals.

The illegality of the dismissal of the appeal on motion, which is sought to be reviewed herein, is fully established in the Petition (20-23).

That erroneous denial of the right of appeal deprived your petitioner of his right to a first chance on the issues of fraud; and his right to a second chance on the issues of unlawful transfer of the cause, and unlawful adjudication of the rights to the proceeds of the policies of insurance.

Thus it is apparent that the granting of certiorari herein is required to protect and enforce petitioner's rights to the chances of which he has been discriminatorily deprived.

XII. A Cause of Public Importance Should Be Reviewed Regardless of an Incidental Benefit to a Litigant.

The public importance of this case is obvious. Petitioner had become the absolute owner, sole beneficiary, premium payer and possessor of the insurance contracts involved herein pursuant to recognized, acceptable, legal written instruments. Under the Consti-

tution and laws of the United States petitioner's rights in those contracts were secure and free from attack. Nevertheless it was attempted to impress the proceeds with an alleged oral trust supposedly created "at the time" when decedent—insured transferred all rights in said insurance contracts to petitioner.

The alleged oral trust was untrue, unproved and unprovable. There was not even an attempt made in the District Court to establish a trust. Under such circumstances, the judgment therein, sought to be reviewed herein, is judicially unsound in the extreme. If that judgment is not reviewed and reversed, then a coast to coast racket could develop which would endanger the citizens' funds, including trusts and estates as well as insurance proceeds. Thus all that a designing conniver need do is obtain the services of an unprofessional attorney who can get a Judge to agree with his preposterous theory. It is respectfully submitted that this Honorable Court will hasten to resolve such conflicts as this dangerous precedent presents.

The review and reversal of the judgments sought to be reviewed would, of course, bestow important benefits upon petitioner, and deservedly so. Those just results, however should not deter the review and reversal which would be of such great importance to the public, because this Honorable Court's adjudications in the past have benefited innumerable citizens with or without benefit to the public.

The petition for writ of certiorari as amended, therefore, should be granted.

Respectfully submitted,

PAUL GINSBURG
Counsel for Petitioner